

A Contractor's Guide to Surviving a Government Shutdown

By Tom Marcinko

BACKGROUND

As the late great Yogi Berra once said, "It's deja vu all over again!" The never ending political stalemate in Washington seems more and more likely to lead to a government shutdown. If our leaders cannot reach a compromise, the government will shut down beginning on January 20, 2018. The ramifications of a government shutdown are difficult to predict. What can be predicted is that a shutdown will adversely affect Government contracting. Someone may "win" this game of brinkmanship but regardless of political orientation, most government contractors, contractor employees, and the important government programs they support will suffer.

Of course the shutdown could still be averted. Or it could be of such a short duration that it is only a minor inconvenience. But with so much at stake, it would be foolhardy for government contractors to assume a shutdown won't happen. Though many things, such as the duration are unknown (The 1995 and 2013 shutdowns lasted more than 3 weeks and 16 days respectively) one thing is certain: contractors that have prepared will suffer less than their unprepared competitors. Aronson recommends that government contractors develop a "shutdown contingency plan."

Unfortunately, there is not a single "one size fits all" approach to dealing with a shutdown. The Federal Acquisition Regulation (FAR) and the corresponding FAR clauses do not specifically address the contractor's rights and obligations in the event of a government shutdown. The appropriate course of action must be determined on a contract by contract basis based on the totality of the circumstances. In other words, the shut down contingency plan must address each contract individually.

The purpose of this whitepaper is to provide contractors with guidance of how to respond to a shutdown. We begin with a general description of how the shutdown is likely to affect government contracting. We will then list a variety of factors that contractors need to consider in determining how the shutdown will specifically affect them. Finally, we will offer some possible actions that contractors can take to minimize, if not avoid, the adverse consequences of a shutdown.

RAMIFICATIONS

The ramifications faced by contractors during a government shutdown are widespread and vary in degree from annoying to the catastrophic. Contractors who support "mission essential" functions involving safety, security or other legally mandated activities not subject to annual appropriations may be unaffected as those projects will be exempt from the shutdown. Other less fortunate contractors may find that their entire line of business grinds to a halt. Most contractors will probably find themselves somewhere in between these two extremes. While the impacts of the shutdown on individual contractors will vary it is fair to say that the industry as a whole will:

1. Encounter delays in completing contracts.
2. Encounter delays in receiving new awards.
3. Incur both direct and indirect expenses that may or may not be recouped.
4. Lay off or furlough employees that may or may not return.

The reasons that most contractors will experience one or more of these occurrences are set forth below.

1. *Incrementally funded contracts will not be incrementally funded*

Incremental funding will not be added to existing contracts that require funding from the GFY 2018 appropriations.

2. *There will be no new contracts or modifications issued*

No contracts, task orders, or modifications will be awarded that require fiscal year 2018 funds. Once the government employees are furloughed, there will be no contracting officers to issue non-essential contracts or modifications of any type.

3. *Ongoing procurements will be delayed*

The furloughed government acquisition personnel will not be available to prepare non-essential RFPs, evaluate proposals, conduct audits, or generally accomplish any other pre-award work. In fact, you may be responding to a solicitation with a due date that is over come by events but there might not be a contracting officer working who can amend the solicitation.

4. *Options won't be exercised*

Even if you have a contract that otherwise can be performed despite the shutdown, the government will be unable to exercise your option.

5. *Government facilities will be closed*

Contract performance that requires access to non-essential government facilities or equipment might be impossible to perform as those facilities will be closed.

6. *COTRs will not be able to fulfill their responsibilities*

The non-essential Contracting Officer's Technical Representatives (COTRs) will also be furloughed. So any contract that requires COTR action or input such as approving an interim deliverable, travel, or an essential expenditure will be impossible to perform.

7. *Invoices*

Even if you have a contract that otherwise can be performed, the government personnel required to process and pay your invoices may be furloughed.

8. *Statutory deadlines are not necessarily extended*

The various statutory deadlines such as the time to request a debriefing, file a bid protect, a claim, the appeal of a contracting officer's final decision, are not extended due to the shutdown. Extensions may be granted after the fact on a case by case basis but don't assume the deadline will be extended.

9. *Actual indirect rates will exceed the provisional rates*

It is almost impossible for contractors to reduce indirect expenditures at the same pace as the shutdown will reduce the contract direct base. The increased indirect rates serve to reduce the profit on existing fixed price and time and material contracts and on cost reimbursement contracts with indirect rate ceilings. It is possible that the government could reimburse the "unabsorbed overhead" but there is no guarantee they will do so.

10. **Stop work order claims**

Contractors have 30 days to submit a request for an equitable adjustment for costs attributable to the stop work order. Contractors must ensure they are documenting all costs attributable to the stop work order by contract and have the resources to prepare and submit what might be numerous requests for equitable adjustment within 30 days after the stop work order is canceled.

These are the most obvious scenarios that will directly impact contractors. However, there will undoubtedly be a multitude of more nuanced indirect affects depending on the specific circumstances.

GENERAL CONSIDERATIONS

There is no FAR clause that directs the contractor to stop work in the event of a shutdown. Just the opposite, you are under contract and until you hear otherwise, you are legally obligated to perform. Theoretically, the Government should issue a "stop work order" for each contract that is not to be performed during the shutdown. Though this sounds counter intuitive a stop work order may be the best outcome for the contractor because the rights and obligations of both parties are clear and the contractor will be reimbursed for the expenses resulting from stopping and re-starting the work. In previous shutdowns, some agencies routinely issued stop work orders in some cases for contracts that could have been performed. In the 1995 shutdown, the EPA issued numerous stop work orders. However, most contracting officers just provided general "one size fits all" instructions to their contractors. These general instructions frequently left many questions unanswered.

Appreciate the difference between a "hard" and "soft" shutdown. A hard shutdown is typically required by a formal stop work order and usually means that the contractor must immediately take all necessary steps to stop incurring expenses in furtherance of contract performance. A soft shutdown allows the contractor and the contracting officer more flexibility to make common sense decisions in the best interest of the tax payer. It is important to understand whether the contracting officer is requiring a soft or hard shutdown. A soft shutdown would be appropriate in a situation where it will cost \$10,000 to stop and then restart some activity, but it will only cost \$100 to let the activity continue for a week.

Be sympathetic to your contracting officer. They are apt to be as confused as you are and they, like some of your employees, are likely facing a furlough. The government's internal guidance and rules for operating during a shutdown were developed when service contracting was much less prevalent. Thus the guidance is geared towards how to deal with civil servants and is based on the assumption that most contractors provide supplies and equipment. Shutting down a government that is heavily dependent on contractor employees is substantially more difficult. Do not expect everything to go smoothly.

Has the program you support has been declared an essential function. This is a more complex decision than it previously was due to the prevalence of contractors and the increasingly sophisticated and comprehensive IT systems that contractors typically maintain. Some IT contractors may find that the IT systems they maintain support a back office function that in turn supports an essential function. The Administration's broad or narrow definition of essential functions will have a great bearing on how large an impact the shutdown has on contractors.

Many, perhaps most contractors routinely "work on risk," in advance of receiving funding. However, working on risk during a government shutdown is riskier and all contractors should revisit their criteria for when it is acceptable to work in advance of the funding.

SPECIFIC CONSIDERATIONS

1. Funding

The amount and type of contract funding is one of the most important considerations.

Amount: Is your contract fully funded? If incrementally funded how much longer will the existing funds last? Is it feasible to defer expenditures to extend the current funding? Fixed price contracts are usually fully funded. Cost reimbursement and time and material contracts are typically incrementally funded. Once the incremental funding on a contract is fully expended, the contractor should seriously consider stopping work. Per the Limitation of Funds clause, the government is not obligated to reimburse contractor expenses in excess of the funded amount.

Type: Is your contract funded with Fiscal Year 2018 money or with multi-year appropriations or revolving funds? Programs funded by revolving funds or multi-year appropriations are not affected by the shutdown.

2. Place of performance

Is the work performed at a contractor facility or a government facility? If the contract is performed at a government facility will that facility be accessible to contractor personnel during the shutdown? Please note that just because a facility is closed to the public does not necessarily mean that it is inaccessible to contractors. Also, depending on the nature of the work, it may be possible to continue performance at your own facility.

3. Period of performance

What is the current period of performance? Is there an option coming up that needs to be exercised? Contracting officers will not be able to exercise options or otherwise extend contracts during the shutdown. Working without adequate funding is risky. Working on a contract after the period of performance has expired is even riskier.

4. Source of Work

The nature of the work to be performed is also an important factor, albeit a factor that is difficult to describe. Does the work require government personnel to be present? If you are supporting an office full of government employees who are not working does it make sense to continue to provide this support even if contractually you can? Does the nature of your work require frequent interaction, guidance, approvals from a Contracting Officer's Technical Representative (COTR) who is no longer present? In some cases fully funded contracts performed at the contractor's facility may still be impossible to perform if the government personnel are absent.

5. Invoices

It may be possible to perform some contracts but, due to lack of personnel the government will be unable to process and pay your invoice until the government re-opens.

6. Subcontractors

Do not forget about your subcontractors. They have privity with you, not the government. You do not want to owe your subcontractor more money than you will be paid by the government. Prime contractors should ensure that they have not inadvertently agreed to make the subcontractor whole after the shutdown when the government has made no such guarantee to the prime.

ACTION PLAN

There are several specific actions that contractors should take to prepare for and ultimately survive the government shutdown. However, the specific actions will be ineffective unless the contractor adheres to the following two general commandments.

- Thou shall communicate.
- Thou shall document.

Communication and documentation are important concepts for any business. However, communication and documentation need to become the mantra of any government contractor facing a government shutdown. There should be almost constant communication between the contractor, the contracting officer, the COTR, the contractor employees and any subcontractors and suppliers. The purpose is to provide all the stakeholders with accurate timely information. Rumors, speculation and a lack of information never help and may hurt. Contractors should make an individual responsible for ensuring that the necessary communication takes place. This may require that an actual communication plan with appropriate protocols be developed.

It is not always clear whether or how much of a contractor's additional expense attributable to the shutdown will ultimately be reimbursed. But what is clear is that none of it will be reimbursed if the contractor does not document what actions were taken, why that action was in the government's best interest and exactly how much that action cost.

The specific steps Aronson recommends are outlined below.

1. Evaluate your contracts

Companies should assign someone, whether a corporate team or the assigned project manager/contracts administrator, to review each contract based on the specific considerations set forth in the section above.

2. Seek guidance from the contracting officer

Contracting officers are responsible for providing guidance to the contractors. You should be proactively and regularly contacting your contracting officer to obtain as much specific direction regarding the shutdown as you can. Ask specific questions based on your evaluation, such as "We have three employees deployed overseas. It will cost over \$20,000 to bring them home and reposition them when the shutdown is over. It only costs \$2,000 a week to keep them there. How would you like us to handle that?" The more specific direction you get the easier it will be to get reimbursed later. Of course all direction received should be documented in writing and followed. Your contract files should contain documentation that the instructions were followed. Subcontractors should seek guidance from the prime contractor.

3. Classify your contracts

Aronson recommends classifying your contracts into one of four categories because each category requires different actions. The categories and actions are summarized below.

- a. Mission essential

Some of your contracts may be considered mission essential and thus exempt from the shutdown. Your contracting officer will inform you if this is the case. You may continue to perform these contracts under a business as usual approach.

b. Stop work orders and terminations for convenience

Some contracting officers will issue stop work orders or in unusual cases may terminate the contract. In that case, the contractor has no choice but to react in accordance with the requirements of the stop work order clause or the termination clause. The good news is that in these instances, the regulations are very clear as to what the contractor must do and how the contractor is to be reimbursed.

c. Possible to perform

Unless your contracting officer has directed otherwise, contracts that have sufficient funding and period of performance and do not require access to government facilities or personnel can and probably should be performed even though they are not mission essential. However, these contracts still need to be monitored because, if the shutdown lasts long enough, the contract for a variety of reasons may ultimately become impossible to perform. Also, depending on the circumstances, there may not be anyone available to process your invoice.

d. Impossible to perform

This is the most troublesome and potentially risky classification for contractors. Contracts in this category are not mission essential nor has a stop work order been issued. Yet the nature of the work is such that the contract cannot be performed during a shutdown. Of course the contractor should follow the specific directions provided by the contracting officer. In cases such as this, the contracting officer is probably going to suggest some kind of soft shutdown. However in some cases the contractor may not have received instructions or the instructions were too general or were unclear. This is not a legal term but the contractor should treat situations where the government shutdown prevents a contractor from performing the contract as a “constructive” stop work order. In those cases, the contractor should cease performance as required by the stop work clause. The assumption is the same procedures and rules that govern contractor compensation when a formal stop work ordered is issued should work equally well in situations where the government’s actions effectively stopped the work without the formality of a stop work order.

5. *Develop plan for employees*

What is the current period of performance? Is there an option coming up that needs to be exercised? Contracting officers will not be able to exercise options or otherwise extend contracts during the shutdown. Working without adequate funding is risky. Working on a contract after the period of performance has expired is even riskier.

6. *Where possible, complete actions before the shutdown*

Contractors should make every effort to get outstanding invoices paid, modifications issued, options exercised, tasks awarded, deliverables approved before the government shuts down.

7. *Notify the contracting officer of the impacts of the shutdown*

Do not assume the impacts are obvious to the government. You need to notify the contracting officer each time the shutdown affects your ability to perform the contract. It is possible that the government could use your failure to notify them as a reason not to reimburse your shutdown related costs.

8. *Provide direction to your subcontractors*

Each subcontract should be reviewed to ensure that important clauses such as the Limitation of Funds clause are included. All subcontractors should receive clear instructions from the prime regarding the shutdown.

9. Cash flow

Invoices may not be paid or at the very minimum payments will likely be delayed. Contractor should analyze their projected cash flow to ensure solvency and notify their Line of Credit bank.

CONCLUSION

Most government contracting professionals have at best limited experience with government shutdowns. Therefore, it is unlikely that everything will proceed smoothly. Even the most optimistic among us are predicting at least some level of pain and suffering for all parties concerned. However, by following the steps outlined above, contractors can minimize the damage and survive the shutdown.